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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

Office-Supreme Court, U.S.
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No. 375

VELMA L. MENGELKOCH, MARY FAZZIO, and DEA C. KASKELA, as citizens of the United States and of the State of California, on their own behalf and on behalf of all other citizens of the State of California similarly situated,

APPELLANTS

v.

INDUSTRIAL WELFARE COMMISSION, and NORTH AMERICAN AVIATION, INC., a corporation,

APPELLEES

PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellant Velma L. Mengelkoch petitions this Court to grant rehearing of its per curiam decision of October 28, 1968, vacating the order of the three-judge court and remanding this case to the District Court so that a timely appeal may be taken to the Court of Appeals. For grounds, appellant states:

1. On October 4, 1968, a three-judge court, duly constituted in *Ward v. Luttrell*, 69 LRRM 2593 (E.D. La.),[1] followed the lead of the three-judge court below and concluded that plaintiffs' charge that Louisiana's "Jane Crow" statutes

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[1]The three-judge opinion in *Ward* in the Appendix, *infra*.

were discriminatory and violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, did not present a substantial constitutional question, even though neither this Court nor the Supreme Court of Louisiana had passed upon the constitutionality of the challenged statutes. The three-judge court in *Ward*, noted that "[s]ociological and economic changes * * * have occurred since the early 20th century decisions" of this Court in *Miller v. Wilson*, 236 U.S. 373, and *Muller v. Oregon*, 208 U.S. 412, but it, like the three-judge court below, was unable to discern the distinctions in those cases, which were pointed out in appellant's Jurisdictional Statement, pp. 10-11, and in her brief below (pp. 21-23), which is in the record before this Court (R. 61-63). Therefore, the three-judge court in *Ward* concluded that those decisions must control until this Court makes clear that it has abandoned the 19th century notions that women are "socially and economically inferior to men" and repudiates the dicta in those decisions approving discriminatory treatment of women. The court in *Ward* pointed out that "The opportunity to do so may be presented in the appeal in *Mengelkoch v. Industrial Welfare Commission.*".

Appellant urges the Court to take "the opportunity" which this appeal affords and make clear that it has abandoned the 19th century notion that women are "socially and economically inferior to men." Not to do so is to deny the basic constitutional right to earn a living to all women of all races for many years to come and to make a mockery out of the three-judge statutes.

As this Court pointed out in *Swift & Co. v. Wickham*, 382 U.S. 111, 124, "The purpose of the three-judge scheme was in major part to expedite important litigation; it should not be interpreted in such a way that litigation * * * is delayed while the proper composition of the tribunal is litigated." The instant case is important. No one—not even appellee—would deny this. Not only that, but the complaint was filed over two years ago in October, 1966, and the

three-judge court, which was convened to hear the constitutional issues, deliberated for more than a year before it decided to "dissolve" itself. Review by this Court, we submit, is thus plainly indicated.

2. *Wilson v. City of Port Lavaca*, 391 U.S. 352, cited by the Court as supporting its action in the instant case, is clearly distinguishable. The plaintiff there—an unhappy taxpayer—sought to restrain local municipal authorities from *invoking* a statute which provided that banks shall not be required to disclose amounts deposited by any depositor to third parties, except in certain circumstances. As the three-judge court pointed out, "neither of [the local parties] enforces or executes such statute. Indeed, there is no party defendant who does" (285 F. Supp. at 87). While plaintiff sought to rescue his case by pointing to his prayer for injunctive relief—that the City be restrained from enforcing its tax lien—the three-judge court pointed out, quite properly, that "no attack is made upon the constitutionality of the state statute authorizing the enforcement of the liens." Here, in sharp contrast, appellants seek to enjoin the California Industrial Welfare Commission from enforcing section 1350 of the California Labor Code on the ground that it is violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution because it discriminates against women in employment opportunities.

The instant case is thus one which requires a three-judge court, "not merely because a state statute is involved," but because "a state statute of general and statewide application is sought to be enjoined." *Moody v. Flowers*, 387 U.S. 97, 101, and cases there cited.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, probable jurisdiction be noted, inasmuch as this case involves substantial federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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Attorney for Appellant,
Velma L. Mengelkoch

CERTIFICATE OF COUNSEL

I hereby certify that the petition for rehearing filed in this cause is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Sylvia S. Ellison

APPENDIX

WARD v. LUTTRELL

U.S. District Court,
Eastern District of Louisiana

WARD, et al. v. LUTTRELL, etc. et al., No. 67-1622, October 4, 1968

STATE LAWS

—Louisiana maximum-hours laws — Discrimination against women — Federal Constitution — Civil Rights Act of 1964 — Jurisdiction of three-judge court ▶ 107.47

Three-judge federal district court does not have jurisdiction of injunction action alleging that Louisiana maximum-hours laws (SLL 28:302) applicable to women are discriminatory, violate Fourteenth Amendment to Federal Constitution and Civil Rights Act of 1964, since (1) U.S. Supreme Court has upheld constitutionality of similar statutes of other states; and (2) interpretation of issue of alleged conflict between state and federal statutes is not function for three-judge court—Ward v. Luttrell (DC ELa, 1968) 69:2593.

Injunction action to have Louisiana maximum-hours laws (SLL 28:302) declared void by three-judge federal district court. Three-judge statutory court is dissolved and case is returned to district court.

R. M. Mathews, for plaintiffs.

Jack P. F. Gremillion, Attorney General of Louisiana; William P. Schuler, Second Assistant Attorney General; John M. Currier, Assistant Attorney General; William P. Curry, Jr., Special Counsel, for defendants.

Before AINSWORTH, Circuit Judge, and BOYLE and RUBIN, District Judges.

Full Text of Opinion

BOYLE, District Judge: — This action is brought by fourteen women alleging that they are employed by Southern Bell Telephone and Telegraph Company and The Boeing Com-

pany at the Launch System Branch of the National Aeronautical and Space Administration's Michoud Assembly Facility in New Orleans, Louisiana.

Jurisdiction is invoked under 28 U.S.C. 1343(3) and (4) and The Civil Rights Act of 1964.

The defendants are the Commissioner of Labor of and the State of Louisiana, Department of Labor.[1]

Some of the plaintiffs are engineers,[2] doing engineering work, but classed as clerical employees. Others are "framemen" who route orders and the remainder are telephone operators.

For themselves, and all women workers in Louisiana, as a class, plaintiffs pray for injunctive relief on the ground that the Louisiana maximum work hour laws applicable to women[3] are discriminatory and violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and, therefore, are null and void. They further urge that such labor laws are repugnant to the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(a) and 2000-h).[4]

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1 The Commissioner and Department of Labor, through the Commissioner, are charged with the administration and enforcement of the Louisiana labor laws, rules and regulations. Louisiana Revised Statutes, Title 23, Section 1, et seq.

2 It does not appear whether the engineer plaintiffs are registered or not. See LRS 37:681 et seq.

3 Louisiana Revised Statutes, Title 23, Labor, Part IV. Female Persons, Sub-parts A through D.

4 42 U.S.C. 2000e-2(a)—It shall be an unlawfulful employment practice for an employer—

(1) to fail or refuse to hire, etc., "or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex. . . ."

(2) "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's . . . sex. . . ."

42 U.S.C. 2000-h4—

"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

Plaintiffs also pray for hearing of the matter by a Three-Judge Court, which has been duly constituted.

[DEFENSES RAISED]

The defendants have answered, urging, in addition to a general denial, the following defenses:

1. This is not a proper case for determination by a Three-Judge Court as provided by 28 U.S.C.A. 2281, inasmuch as many statutes similar to the ones here attacked have previously been held to be constitutional and, therefore, the constitutional attack upon these statutes is wholly insubstantial, legally speaking non-existing.

2. Plaintiffs fail to state a claim upon which relief can be granted, inasmuch as plaintiffs bring this suit as a class action on behalf of themselves and other women similarly situated in the State of Louisiana and, therefore, it is submitted that plaintiffs do not fully, properly and adequately represent the class with which they seek to be identified.

3. Plaintiffs fail to state a claim upon which relief can be granted, inasmuch as plaintiffs fail to state any act or practice of discrimination contemplated or intended to be covered by the Civil Rights Act of 1964.

4. The "female labor" statutes under attack are a valid exercise of the police powers of the State as reserved to it by the Tenth Amendment to the Constitution of the United States and relations between employer and employees are proper subjects for legislative regulations under the State police power to legislate for the general welfare.

Plaintiffs have also moved for an order maintaining their action as a class action under FRCP Rule 23.

We consider first whether this is a proper case for the Three-Judge Court which has been constituted.

The defendants urge that a Three-Judge Court is not required when the action presents an insubstantial claim of unconstitutionality, and contend that because the constitutionality of female labor statutes, on several occasions, has been sustained by the Supreme Court of the United States, the present action does not present a substantial constitutional question.

Indeed, a Three-Judge Court is not required where the constitutional issue is not a substantial one. Levering & Garrigues Co., et al, v. Morrin, et al, 289 U.S. 103, 53 S. Ct. 549, 77 L. Ed. 1062 (1933); Ex Parte Poresky, 290 U.S. 30. 54 S. Ct. 3, 78 L. Ed. 152 (1933); Swift & Company v. Wickham, 382 U.S. 111, 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965). Lack of substantiality may appear either because it is obviously without merit or because its unsoundness results from previous decisions so as to foreclose the subject. California Water Service Co. v. City of Redding, 304 U.S. 252, 58 S. Ct. 865, 82 L. Ed. 1323 (1938); Levering & Garrigues Co., et al, v. Morrin, et al, supra; Ex Parte Poresky, supra; Swift & Company v. Wickham, supra; German v. South Carolina State Ports Authority, 295 F. 2d 491, 48 LRRM 3159 (4th Cir. 1961); Mengelkoch v. Industrial Welfare Commission, et al, 284 F. Supp. 950, 956, 69 LRRM 2537 (C.D. Cal. 1968)—(Appealed August 5, 1968—No. 375, Supreme Court—1968 Term).

The United States Supreme Court has not passed upon the constitutionality of the Louisiana female labor laws so far as we have been able to ascertain. Nor have we been able to discover any case in which the Louisiana Supreme Court has passed upon the question.

[PRIOR DECISIONS]

However, statutes of other States, prescribing maximum work hours for women, have been held constitutional in no less than five cases. California: Miller v. Wilson, 236 U.S. 373, 35 S.Ct. 342, 59 L. Ed. 628 (1915); Bosley v. McLaughlin, 236 U.S. 385, 35 S. Ct. 345, 59 L. Ed. 632 (1915); Massachusetts: Riley v. Massachusetts, 232 U.S. 671, 34 S. Ct. 469, 58 L. Ed. 788 (1914); New York: Radice v. New York, 264 U.S. 292, 44 S. Ct. 325, 68 L. Ed. 690 (1924); Oregon: Muller v. Oregon, 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551 (1908).[5]

[5] See also: Bunting v. Oregon, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830 (1916), in which an Oregon statute relating to maximum work hours for males was held constitutional; West Coast Hotel Co. v. Parrish, 300 U.S. 379, 59 S.Ct. 578, 81 L.Ed. 703, 1 WH Cases 38 (1937), in which a State of Washington statute providing minimum wages for women was held constitutional.

Sociological and economic changes, which have occurred since the early 20th century decisions of the Supreme Court dealing with female labor laws, may be cited to dispel the 19th century notions that women, historically, have been dependent upon and are socially and economically inferior to men. Nevertheless, we find no distinction in the issue presented here and that presented in Muller v. Oregon, supra, and the other cases cited above. Those cases must control here until such time as the Supreme Court makes clear it has abandoned the reasoning giving rise to those earlier decisions and thus declares the law, in fact, changed.[6] The District Court, even when sitting as a Three-Judge Court, cannot reverse the Supreme Court.

The Fourteenth Amendment claims alleged in the complaint, we conclude, are too insubstantial to support the jurisdiction of a Three-Judge Court.

[CIVIL RIGHTS ACT]

The only remaining basis on which complainants seek to enjoin enforcement of the State statutes is their asserted repugnancy to the Civil Rights Act of 1964. This claim is, of course, grounded in the Supremacy Clause of the Constitution, which would require, if conflict be found between the State and Federal statutes, that the State enactments give way. The basic question involved in such claim is not one of interpretation of the Federal Constitution, but one of comparing two statutes. That function is not one for a Three-Judge Court. Swift & Company v. Wickham, supra.

Accordingly, the three-judge statutory Court is hereby dissolved and the case returned to Judge Edward J. Boyle, Sr., from whom the matter emanated, for further handling.

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[6] The opportunity to do so may be presented in the appeal in Mengelkoch v. Industrial Welfare Commission, et al, supra.